RECENT DECISIONS

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ALIENS—ENEMIES—RIGHT TO INHERIT.—An American born woman married an Austrian in this country. Both resided in and were loyal to the United States. After war broke out between the two countries her father died intestate, leaving real property in a state where only friendly aliens could inherit. *Held,* she could inherit from him. *Hughes* v. *Techt.* (1st Dept. 1919) 188 App. Div. 743, 177 N. Y. Supp. 420.

It is now settled law that a female citizen who marries a foreigner becomes an alien. 34 Stat. 1228, U. S. Comp. Stat. (1916) § 3960, construed in *Mackenzie* v. *Hare* (1915) 239 U. S. 299, 36 Sup. Ct. 106. And there is a common notion that war *ipso facto* makes the citizens of one belligerent enemies of the other. See *Herrera* v. *United States* (1911) 222 U. S. 558, 569, 32 Sup. Ct. 179. This statement seems to mean, however, that if the country's safety demands an alien's restraint, the courts will receive no other evidence of friendship or enmity than proof of his allegiance to a belligerent. *Ex Parte Graber* (1918) 247 Fed. 882; *Ex Parte Weber* (1916) 1 A. C. 421. But in passing on civil rights,—as the right to sue and be sued, to contract, and freedom from property confiscation,—a different problem is presented, and then the courts almost universally make the test residence or place of carrying on business. *Heiler* v. *Goodman's, etc., Co.* (1918) 92 N. J. L. 415, 105 Atl. 233; see *Society for the Propogation of the Gospel* v. *Wheeler* (1814) 22 Fed. Cas. No. 13,156; *Porter* v. *Freudenberg* (1915) 1 K. B. 857, 868. Indeed, a citizen is deemed an enemy in this connection if he voluntarily resides in the adverse country. *Juragua Iron Co.* v. *United States* (1909) 212 U. S. 297, 29 Sup. Ct. 385. The question in the instant case seems never to have arisen before, but since the right to inherit is analogous to the civil rights last mentioned, the court seems to have been justified in making the test of friendship a factual rather than a fictional one. Moreover, the President's Proclamations of Dec. 11, 1917 and April 19, 1918 and the Trading with the Enemy Act, 40 Stat. 411, U. S. Comp. Stat. (1919) §§ 3115½*a*—3115½*j*, have been construed as determining that the United States considered all law-abiding aliens as friendly. *Tortoriello* v. *Seghorn* (N. J. E. 1918) 103 Atl. 393; *State* v. *Darwin* (1918) 102 Wash. 402, 173 Pac. 29. The principal case is undoubtedly both supportable and satisfactory.

APPEAL AND ERROR—SECOND APPEAL TO SAME COURT—REVERSAL OF FORMER DECISION.—The plaintiff, a sub-vendee of an automobile manufactured by the defendant, sued for injuries resulting from the defendant's negligence in placing a defective car on the market. A judgment for the plaintiff was reversed by the Circuit Court of Appeals and remanded for new trial, where judgment was rendered for the defendant. Subsequently, the Court of Appeals of New York, on facts exactly the same as in the instant case, reached the opposite conclusion. The plaintiff brought a writ of error to the Circuit Court of Appeals. Although ordinarily the decision of an appellate court becomes the law of the case and cannot be reviewed, it was *held* that a former decision may be

reversed where it announced a clearly erroneous doctrine. *Johnson* v. *Cadillac Motor Co.* (C. C. A., Second Circuit, 1919) 261 Fed. 878.

It is a generally recognized rule that the decision of a court on a prior appeal is conclusive on the same question on a subsequent appeal. *San Pedro L. A. & S. L. R. Co.* v. *Los Angeles* (Cal. 1918) 179 Pac. 390; see *Catholic Order of Foresters* v. *Collins* (Ind. App. 1919) 122 N. E. 666. To such an extent is the doctrine carried that it is the great weight of authority that a decision on a former appeal, although admittedly erroneous, is the "law of the case", *Strehlan* v. *John Schroeder Lumber Co.* (1913) 152 Wis. 589, 142 N. W. 120; *Bjorgo* v. *First Nat. Bank* (1916) 132 Minn. 273, 156 N. W. 277, and the appellate court is said to have no right to change its views expressed on a former appeal of the same case. See *James* v. *John Flannery Co.* (1915) 16 Ga. App. 639, 85 S. E. 942. Nevertheless, there is a constantly growing minority view—a modern and it is submitted a more reasonable tendency—which, while recognizing the general rule and the policy dictating it, namely the prevention of recurrent litigation over the same issue, makes an exception in a case where the former decision was palpably erroneous, *Henry* v. *Atchison etc. Ry.* (1910) 83 Kan. 104, 109 Pac. 1005; see *Gracey* v. *St. Louis* (1909) 221 Mo. 1, 119 S. W. 949, or where cogent reasons demand that it be reversed. See *Trombley* v. *Seligman* (1909) 133 App. Div. 525, 117 N. Y. Supp. 1063. But this exceptional power should be sparingly exercised, see *Cluff* v. *Day* (1894) 141 N. Y. 580, 582, 36 N. E. 182, and the mere fact of an intervening decision by the supreme court of the jurisdiction *contra* to that reached on a first appeal, does not of itself warrant a reversal on a second appeal. *Phoenix Ins. Co.* v. *Pickel* (1891) 3 Ind. App. 332, 29 N. E. 432; *Comrs. of Tipton Co. v Indianapolis etc. Ry. Co.* (1883) 89 Ind. 101; *Ogle* v. *Turpin* (1881) 8 Ill. App. 453. The conduct of the court in the instant case would seem to be an extension of a hitherto strictly limited exception to the general rule, since the doctrine of *MacPherson* v. *Buick Motor Co.* (1916) 217 N. Y. 382, 111 N. E. 1050, relied on by the court in the instant case for reversing their former decision, is by no means so firmly established as to warrant an appellate court in reversing its former decision. See dissenting opinion of Bartlett, Ch. J. in *MacPherson* v. *Buick Motor Co., supra.*

BANKS AND BANKING—DUTY OF DEPOSITOR TO VERIFY BANK STATEMENT.—The defendant bank without negligence cashed checks drawn by the plaintiff, but which had been fraudulently raised by the plaintiff's bookkeeper. The bank book was balanced and vouchers returned monthly, but it was not until nine months later that the bank was notified of the overpayments. An order dismissing the complaint was affirmed on appeal. *Hammerschlag Mfg. Co.* v. *Importers & Traders Nat'l. Bank* (C. C. A., 2nd Circuit, 1919) 262 Fed. 266.

The relation between bank and depositor being that of debtor and creditor, the bank can justify a payment on the depositors' account only upon actual authority, and the bank is liable for the payment of forged or altered checks, even if it has in nowise neglected to use due care to prevent the fraud. See *Critten* v. *Chemical Nat'l. Bank* (1902) 171 N. Y. 219, 224, 63 N. E. 696; *California Vegetable Union* v. *Crockler Nat'l. Bank* (1918) 37 Cal. App. 743, 174 Pac. 920. However, if the drawer has contributed to or facilitated the fraudulent alterations, as by leaving blanks in the checks unfilled, his own negligence is the proximate cause of the overpayment and he cannot recover. *Her-*